

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MONTY D. ADDISON

v.

SOCIAL SECURITY ADMINISTRATION

MICHAEL S. ATAMANTYK

v.

DEPARTMENT OF THE ARMY

LENA S. HOLLINS

v.

DEPARTMENT OF THE TREASURY

SHIRLEY R. O'NEAL

v.

DEPARTMENT OF THE ARMY

DOCKET NUMBERS
DA04328710240

PH04328710649

DA04328810006

DA04328610428

DATE: FEB 23 1989

ORDER

The Board has determined that the above-noted cases involve similar questions concerning the interpretation of 5 U.S.C. §§ 4302(b)(6) and 4303(c)(2)(A) and 5 C.F.R. § 432.203(b)(1988), and the effect of proposed 5 C.F.R. § 432.104(e)(1), 52 Fed. Reg. 5463, 5465 (February 23, 1987), if published in final form. Therefore, the Board is providing the parties to the above-captioned appeals notice of the opportunity to submit briefs addressing the issues outlined below.

As used in the following questions, the term "performance improvement period" ("PIP") refers to the opportunity required by 5 U.S.C. § 4302(b)(6) and 5 C.F.R. § 432.203(b) (1988). Additionally, unless otherwise stated, any instance of unacceptable performance referenced in these questions is assumed to have occurred within the 1-year period specified in 5 U.S.C. § 4303(c)(2)(A).

1. Under 5 U.S.C. § 4303(c)(2)(A) an agency may base its decision on instances of unacceptable performance which occurred during the 1-year period preceding the advance notice and which were stated in the notice. Is this provision meaningless unless agencies are permitted to rely on unacceptable performance which occurs before or after the PIP but within the 1-year period?
2. If an employee's performance is acceptable or better during the PIP, but then subsequently becomes unacceptable, may the agency take action based on the subsequent performance without informing the employee of the unacceptable performance by providing another PIP? If not, how long a time period must elapse after the initial PIP before a new PIP is required?
3. If agencies are not permitted to rely on pre- or post-PIP performance, apportioning a numerical standard during the PIP may not be feasible or may require agencies to lower the performance standards in some cases. For example, if an employee commits one error under a standard which allows only one error per year, construing the standard to allow the employee to commit an additional error during the PIP would be the equivalent of permitting two errors per year. However, if the employee is

allowed no errors during the PIP, it could be argued that the agency utilized an absolute performance standard during the PIP, which deprived the employee of a bona fide opportunity to improve. In such cases, how can the agency's right to set performance standards be reconciled with the employee's right to an opportunity to improve?

4. If agencies are permitted to consider unacceptable performance that occurs before or after the PIP where the employee's performance during the PIP is acceptable or better, what guidelines should be used in weighting the performance during the various time periods? In addressing this issue, the following questions should be considered.

a) Where a numerical performance standard requires a minimum production or specifies the maximum errors on a yearly basis, can the numerical standard be apportioned over the rating period? For example, if the employee's standard allows a maximum of twelve mistakes per year, should an employee's performance be considered unacceptable if the employee makes two mistakes during the first month of the rating period?

b) At the time an agency places an employee on a PIP, the employee may already have exceeded the number of errors allowed under the applicable performance standard. What criteria should be applied to determine whether or not an employee has demonstrated acceptable performance during the PIP in such cases? If the employee committed no additional errors during the PIP in this example, would a rule which permitted the agency to rely on

the employee's pre-PIP errors make the employee's right to an opportunity to improve meaningless?


c) Should there be different guidelines for weighing pre- or post-PIP unacceptable performance against PIP performance which is acceptable or better with respect to standards which do not allow for numerical measurement?

Briefs addressing these issues from the parties to these appeals must be filed with the Office of the Clerk of the Board on or before March 24, 1989. A copy of any brief filed must be served on each party noted on the attached certificate of service.

The Board may provide the parties and OPM with an opportunity to present oral argument concerning these issues. If it does, the parties and OPM will be informed at a later date of the time and date of the argument.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board